

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

NEW CINGULAR WIRELESS PCS,

Petitioner.

Jill Goyette,

Brian Silvering,

Prabu Maragathavannan

Mark Petrusic,

For the Petitioner.

JAMES R. MICHAL, *Esquire,*

Attorney for Petitioner.

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Board of Appeals No. S-2662
(OZAH Referral No. 06-17)

BEFORE: LUTZ ALEXANDER PRAGER, *Hearing Examiner*

HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE.

New Cingular Wireless PCS, a wireless telecommunications company, petitioned for a special exception under Section 59-G-2.58 to place a "telecommunications facility" consisting of nine antennae, related equipment, and twelve-foot high screening walls on the roof of a three-story building on Georgia Avenue in Silver Spring. (Ex. 1(a)). The building, known as the Burkland condominiums, is a medical office building located at the intersection of Georgia and Dennis Avenues, an R-60 zone. Its street address is 10313 Georgia Avenue; its legal description is lot P-718, tax map 123.

Cingular and Burkland Condominium, Inc. have filed a related request for administrative modification of the Burkland's existing special exception, S-684, to recognize the special exception

requested in this case, assuming that it is granted. Ex. 1(b). This Report does not address that request. As noted below, because I recommend that the Burkland be jointly responsible with Cingular for dismantling all materials and equipment related to the telecommunications facility once the facility is no longer in active use, I recommend that the Burkland be required to apply for special exception relief in this proceeding by formally joining Cingular's petition.

The Montgomery County Planning Board recommended approval of Cingular's petition on March 20, 2006 (ex. 21), as did the technical staff of the Maryland-National Capital Park and Planning Commission on February 23, 2006. (Ex. 21, "Staff Report"). Both recommendations were subject to several conditions. I also recommend approval, with altered and expanded conditions.

The County zoning ordinance permits telecommunications facilities on building rooftops as a matter of right in the R-60 zone if the building is taller than 50 feet. M.C. Code § 59-A-6.14. The ordinance defines a telecommunications facility as consisting of one or more antennae attached to a support structure for use in providing wireless voice, data, or other transmissions. Sec. 59-A-2.1 at 59-A-42 (Feb. 2006).¹

¹ The full definition reads:

Telecommunication facility: Any facility established for the purpose of providing wireless voice, data and image transmission within a designated service area. A telecommunication facility must not be staffed. A telecommunication facility consists of one or more antennas attached to a support structure and related equipment. Antennas are limited to the following types and dimensions: omnidirectional (whip) antennas not exceeding 15 feet in height and 3 inches in diameter; directional or panel antennas not exceeding 6 feet in height and 2 feet in width; and satellite or microwave dish antennas not exceeding 6 feet in diameter. An antenna may be mounted to a structure, a building rooftop or a freestanding monopole in accordance with Sections 59-A-6.12, 59-A-6.14, and 59-G-2.43. Equipment may be located within a building, an equipment cabinet, or an equipment room within an existing building. No lights or signs are permitted on an antenna or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

Placing a telecommunications facility on the Burkland roof requires special exception approval because the Burkland is not tall enough for matter-of-right use. Telecommunication facilities special exceptions are governed by § 59-G-2.58, enacted by M.C. Ordinance No. 15-54, which became effective December 26, 2005, while Cingular's petition was pending. Section 59-G-2.58 is principally concerned with "support structures" for telecommunications facilities. For reasons discussed below, rooftops of existing buildings should not be considered support structures, a view shared by the staff report. Ex. 20 at 10.

Cingular's petition was filed on November 14, 2005, and on December 27, 2005, the Board scheduled a hearing before a hearing examiner for March 20, 2006. The hearing was held as scheduled. Only Cingular and its witnesses (including a representative of Burkland's property manager) appeared. The record contains no evidence of community response. Although the People's Counsel expressed an intention to participate (ex. 19.), no one from that office appeared at the hearing.

At the hearing, counsel for Cingular acknowledged that the signs regarding the petition required to be posted at the site had disappeared. T. 5. The record was kept open until April 21, 2006, to allow for re-posting for thirty days. The new affidavit of posting (ex. 24(c)) and other materials were filed on April 19, 2006.

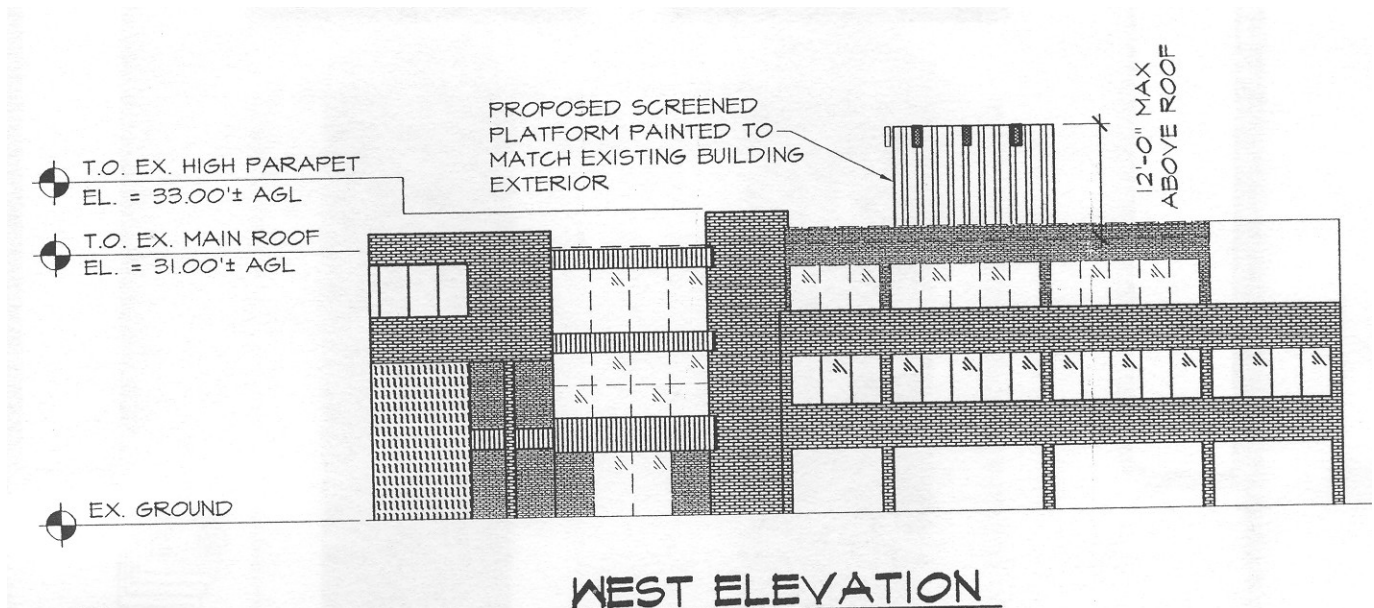
The record was also kept open to permit the Burkland to join as a petitioner. On April 20, the parties filed a petition signed by Cingular's lawyer and by the president of the Burkland Condominium, but still naming New Cingular as the sole petitioner. Ex. 25. I deem that formally deficient and therefore recommend that the petition be revised, yet again, to state explicitly that Cingular and the Burkland are joint petitioners (and will therefore be jointly bound by the conditions imposed by the special exception).

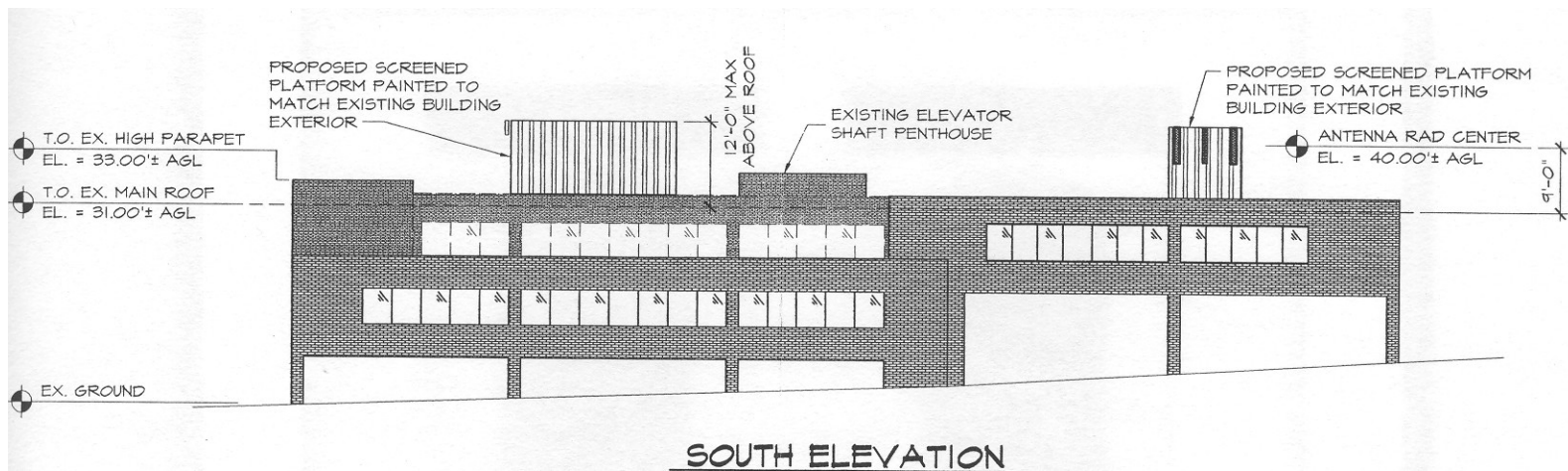
II. BACKGROUND.

A. THE PROPERTY AND NEIGHBORHOOD.

The Burkland building is three stories high. It houses the usual array of medical and dental offices as well as an in-house pharmacy. The Burkland property consists of approximately 2.1 acres. Ex. 9(c); 20 at 2; *but see* 9(c) at 1 (describing the property as consisting of 2.27 acres in 1980). It is zoned R-60 and has on-site parking. Ex. 20 at 2. The building contains 43,600 square feet of space. *Id.* The property is subject to special exception S-684, as amended. See ex. 9(a)-9(c).

The ground on which the Burkland sits slopes upward east from Georgia Avenue. At its highest point, measured from ground level at its western wall, the Burkland building is 31 feet high. See T. 51; ex. 4(a), sheet C-1; ex. 20, att. 3 *but see id.*, att. 7 (describing building as having a height of 39 feet). The building elevations are shown below, excerpted from Site Plan, Exhibit 4(a).





The property faces single-family homes to the west across Georgia Avenue, on the northwest corner of Georgia and Dennis, and on the north side of Dennis. The former Dennis Avenue Elementary School abuts the site to the east. According to the 1989 Kensington-Wheaton Master Plan, the school is now used as a Montgomery County Department of Health healthcare facility. *Id.* at 133, 135, illus. 6-8. Another medical office building, Medical Park Associates, is adjacent to the Burkland on the south. According to the staff report, the “general neighborhood” of the property is bounded roughly by Evans Parkway to the north and east, Medical Park Drive to the south, and Douglas Avenue to the west. (Ex. 20 at 2). The neighborhood is illustrated on the vicinity map on the next page.

The Burkland's rooftop is pierced by an approximately 4-foot tall elevator penthouse. T. 48. The roof also contains low-slung air conditioning and utility equipment which is largely invisible from street level. Ex. 7(d)-(h), (l)-(n). The roof holds a 12-foot “stick” antenna for television reception. Ex. 7(f).



Vicinity Map, Staff Report att. 1

B. MASTER PLAN.

The Burkland is in an area governed by the 1989 Kensington-Wheaton Master Plan. The plan identifies the block in which the Burkland sits as suitable for office and healthcare use. See Plan at 65, illus. 4-12, 197, illus. A-5. The Plan contains no specific recommendations concerning the site or proposed uses.

The staff report states that the special exception use requested here will not be inconsistent with the Plan's goals and objectives. (Ex. 20 at 3 and att. 11).

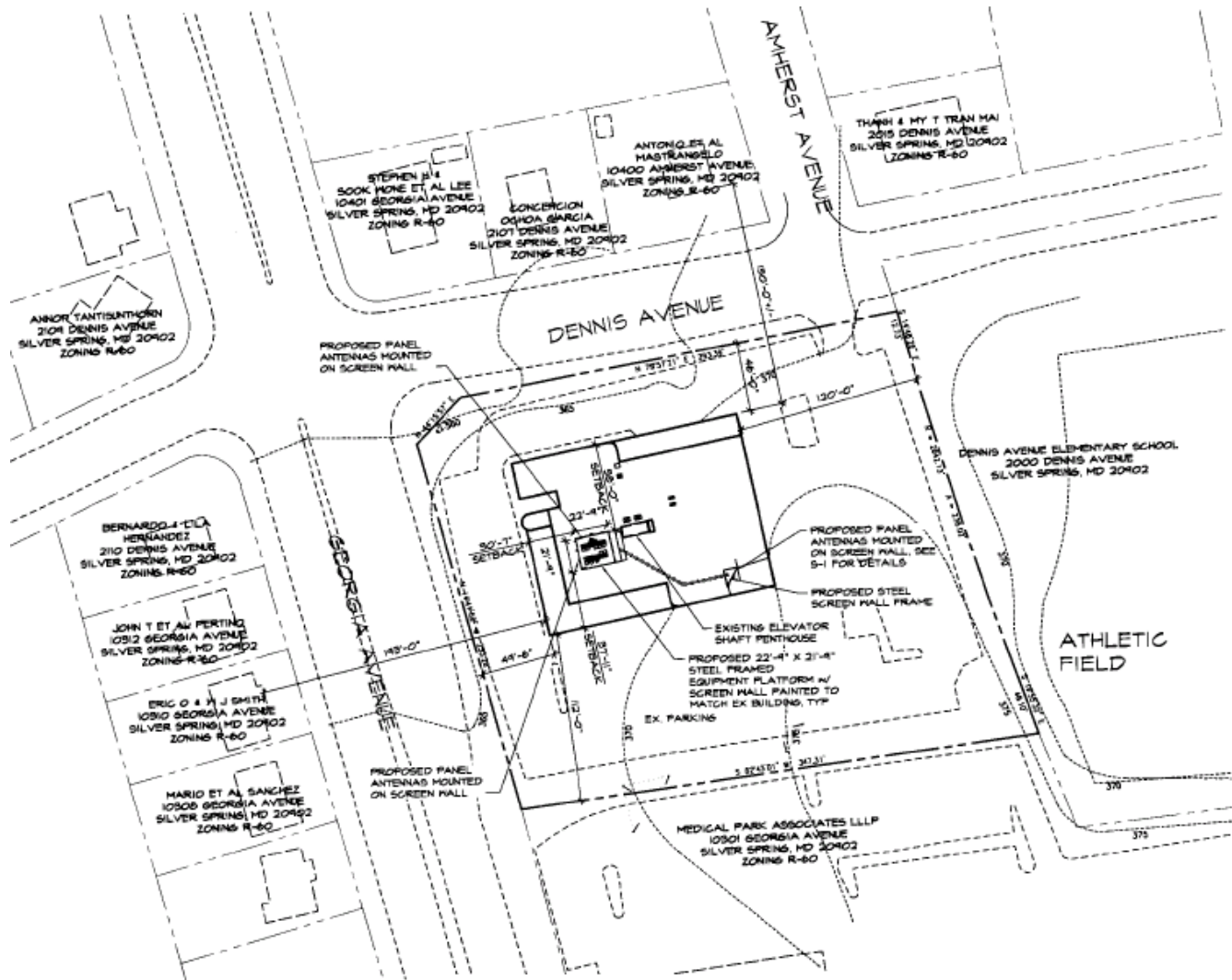
C. PROPOSED USE.

Cingular proposes to erect two structures on the Burkland as shown on the site-plan below. The larger of the two will consist of a raised platform, surrounded by a rectangular 12-foot-high screening wall, near the western edge of the Burkland roof. The screening wall will be 21.75 feet wide on its western and eastern sides and 22.75 feet long on the northern and southern sides. Ex. 4(a). The wall will be painted to match the Burkland's brick exterior. *Id.* See ex. 24(b)(2)-(3).

Six 2-foot-long panel antennae will be attached on the outside of the western and northern sides of the wall. The antennae, which are 5.5 inches deep and 10.3 inches wide (T. 83), will be painted to match the walls. The tops of the antennae will not project above the screening walls. Cingular's telecommunications equipment will be on the raised platform inside the wall, but will be invisible from the outside.

Cingular will also mount a triangular steel-framed structure, twelve feet tall, near the southeast corner of the Burkland roof. The fourteen-foot-long hypotenuse wall, facing southeast, will hold three panel antennae 54.4 inches long, 3.9 inches deep, and 10.3 inches wide. (T. 83). Again, the walls of the structure and the antennae will match the color of the Burkland's brickwork. The tops of these antennae will not project above the screening walls.

The antennae and related equipment will be unmanned and function around the clock throughout the year. A technician will check the equipment monthly and when repairs are necessary. Cingular's equipment will have no lights or signs except for warning signs visible to workmen on the roof, directing them to avoid working in front of the antennae. As one condition of approval, the signs will be no larger than two feet square and will include the name of the facility's owner and telephone numbers to reach its representatives concerning the facility's maintenance and safety.



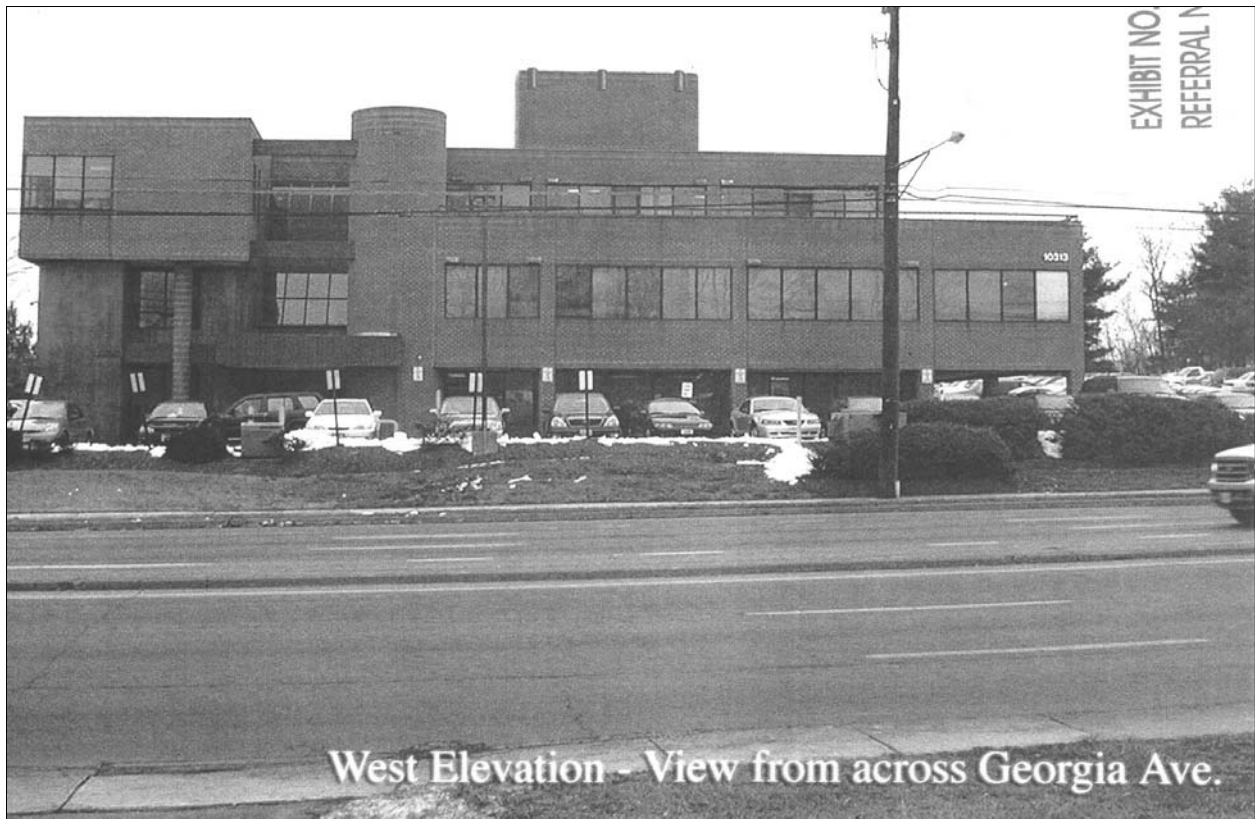
Site Plan Notes, from Ex. 4(a)

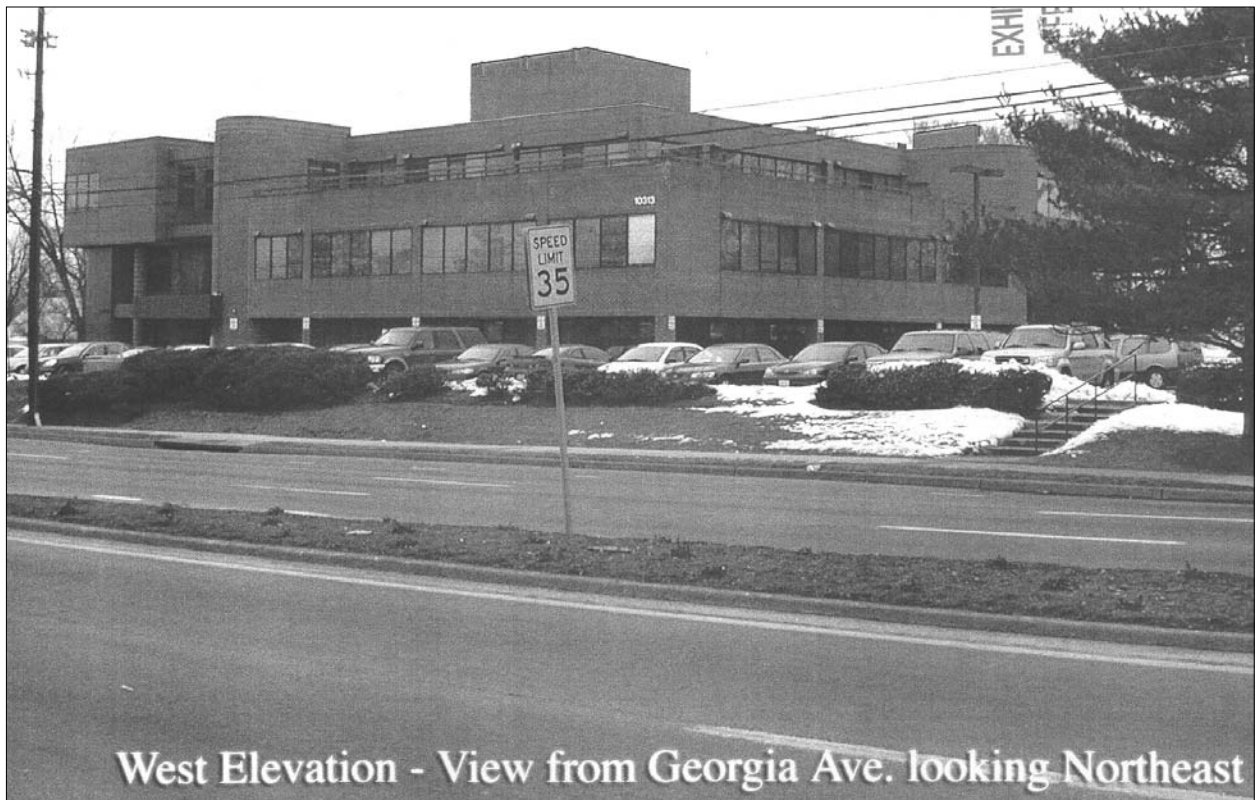
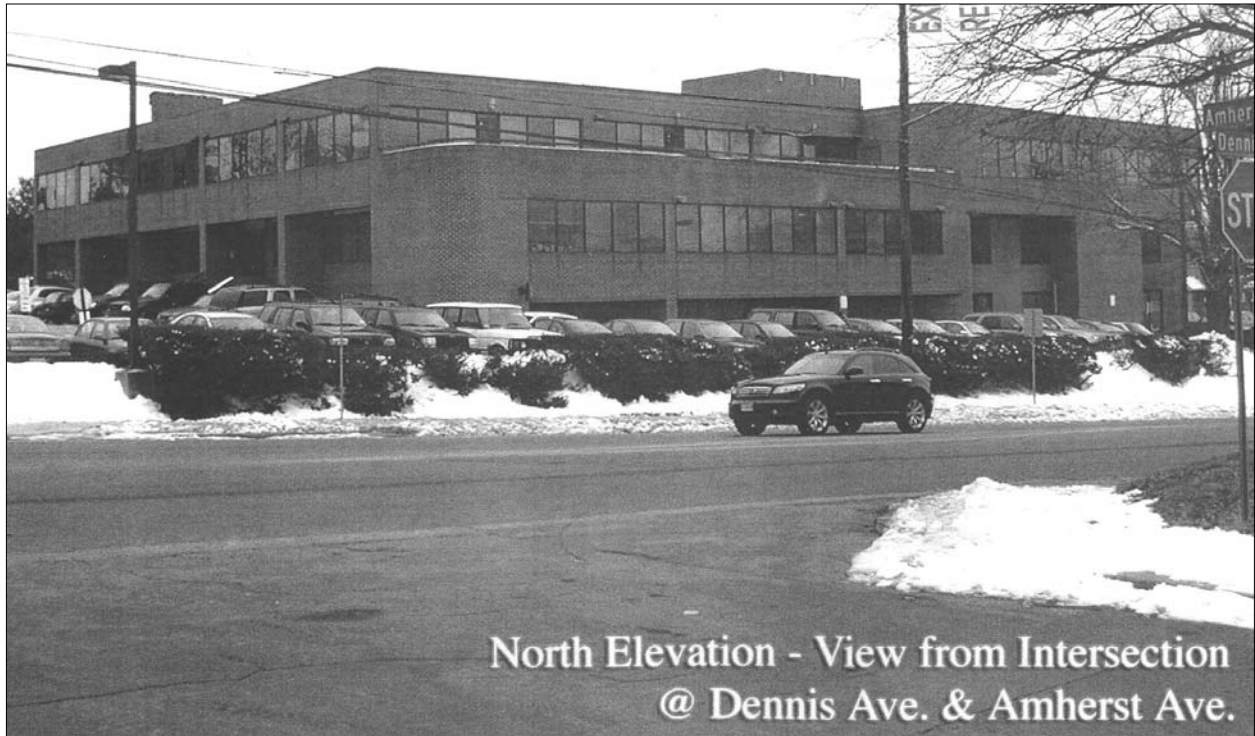
1. APPLICANT: CINGULAR WIRELESS
7150 STANDARD DRIVE
HANOVER, MD 21076 N.T.S.
- APPLICANT'S ATTORNEY: JAMES R. MICHEAL
1220 20TH STREET, NW
WASHINGTON, DC 20036
2. PROPERTY OWNER: A & M PARTNERSHIP
PART OF BURKLAND CONDOMINIUM INC.
10313 GEORGIA AVE #103
SILVER SPRING, MD 20902
CONTACT: MARK PETRUSIC (301) 495-4160
3. SITE DATA: PLAT: 2790 TAX ACCOUNT: 02223884
DEED BOOK: 6268 PAGE: 70
TRACT AREA: AC. +/-
ELECTION DISTRICT: 13TH
ADDRESS: 10313 GEORGIA AVENUE
SILVER SPRING, MD 20902
EXISTING USE: COMMERCIAL
4. CURRENT ZONING: R-60
5. LATITUDE: N39° 01' 29.91" GROUND ELEVATION: 367.00' AMSL (AVG.)
LONGITUDE: W77° 02' 42.92" EXISTING STRUCTURE HEIGHT: 33.00' AGL
TOTAL ELEVATION ABOVE MEAN SEA LEVEL: 400.00'
6. TOTAL DISTURBED AREA = 0 SF
7. THE PROPOSED FACILITIES WILL CONSIST OF ONE (1) 21'9" WIDE x 22'-9' HIGH UNOCCUPIED COMMUNICATION EQUIPMENT SCREENED PLATFORM AND NINE (9) ANTENNAS MOUNTED ON TWO (2) SIDES OF THE SCREENED PLATFORM. AN ADDITIONAL THREE (3) ANTENNAS WILL BE MOUNTED TO AN AUXILIARY SCREEN WALL FRAME AT THE TOP ROOF ELEVATION OF THE EXISTING BUILDING FOR THE TRANSMISSION AND RECEPTION OF CINGULAR WIRELESS TELECOMMUNICATIONS. PLATFORM FLOOR AREA = 495 S.F.
8. THE STRUCTURE WILL NOT SUPPORT LIGHTS OR SIGNS UNLESS REQUIRED FOR AIRCRAFT WARNING OR OTHER SAFETY RECORDS.
9. IF THE ANTENNAS ARE NO LONGER USED FOR TELECOMMUNICATIONS PURPOSES FOR A CONTINUOUS PERIOD OF ONE (1) YEAR, THEY SHALL BE REMOVED BY THE ANTENNA OWNER AT OWNER'S EXPENSE.
10. NO WATER OR SANITARY UTILITIES ARE REQUIRED FOR THE OPERATION OF THIS FACILITY.
11. THIS SITE IS EXEMPT FROM THE FOREST CONSERVATION ACT APPLICABLE TO MONTGOMERY COUNTY PROPERTIES UNDER THE COUNTY CODE, CHAPTER 22A, SECTION 22A-5(s)(1).
12. STORMWATER MANAGEMENT NOTE: NO STORMWATER MANAGEMENT IS REQUIRED FOR THIS SITE.
13. BOUNDARY SHOWN PER COUNTY RECORDS. EXISTING SITE FEATURES SHOWN PER SURVEY BY MORRIS & RITCHIE ASSOCIATES, INC., MARCH 2005.
14. THIS PLAN PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT. PLAN IS SUBJECT TO EASEMENTS AND RESTRICTIONS OF RECORD.
15. ALL DETAILS SHOWN ARE "STANDARD" OR "TYPICAL" FOR REFERENCE ONLY. FOR ACTUAL DETAILS, SEE ARCHITECTURAL, STRUCTURAL, OR CONSTRUCTION PLANS BY OTHERS.
16. THE COMMUNICATION SCREENED PLATFORM SHALL BE UNMANNED, WITH INFREQUENT VISITS (FOUR OR FEWER PER YEAR) BY MAINTENANCE PERSONNEL, AND WITH ACCESS AND PARKING FOR NO MORE THAN ONE VEHICLE. THE PROPOSED FACILITY IS NOT FOR HUMAN HABITATION AND THEREFORE HANDICAP ACCESS IS NOT REQUIRED.
17. THE PROPOSED COMMUNICATIONS SCREENED PLATFORM DOES NOT EXCEED TWELVE (12) FEET IN TOTAL HEIGHT. THE ANTENNAS AND RELATED MOUNTING DEVICES DO NOT EXCEED FOURTEEN (14) FEET IN TOTAL HEIGHT.

According to the staff report, the two structures are not “likely to create adverse visual effects.”

Ex. 20 at 3. Photographic simulations of the proposed rooftop structures appear on the following pages.

Ex. 24(b)(1)-(3). The original exhibits are tinted and appear less stark than the reproductions. I discuss the visual impact below in section IV.B.1.





D. TRANSPORTATION AND ENVIRONMENTAL.

The staff report foresaw no adverse effects on traffic from Cingular's unmanned facility and no need for local area transportation review. Ex. 20 at 4 and att. 10. According to the report, routine monthly inspections and occasional repairs would have no effect on peak-hour traffic. *Id.* The staff report states that access to the site will be by means of the Burkland's existing driveway from Dennis Avenue. *Id.* at 8.

The report raised no environmental issues, assuming compliance with Federal Communications Commission radiation standards. *Id.* at 5. The County tower coordinator and the telecommunications transmission facility coordinating group recommended approval. *Id.*, att. 7.

E. DEVELOPMENT STANDARDS.

The Burkland has previously been found to meet all development standards for the R-60 zone in S-684.²

The telecommunications facility will have no effect on any development standards element--setbacks, lot area, building coverage, parking, or building height. Although the installations will be mounted on the roof, they are not considered part of the roof surface for purpose of measuring building height. See, § 59-B-1.1.

² The relevant development standards, § 59-C-1.32, are

| Development Standard | Requirement |
|-----------------------------|--------------------|
| Minimum front yard setback | 25 ft. |
| Minimum side yard setback | 8 ft. (sum 18 ft.) |
| Minimum rear yard setback | 20 ft. |
| Minimum lot area | 6,000 sq. ft. |
| Maximum building height | 35 ft. |
| Maximum building coverage | 35 % |

III. TESTIMONY AND EVIDENCE.

Cingular presented four fact witnesses: a site acquisition specialist; a structural engineer; a radio frequency engineer; and a representative of the Burkland's property manager. None were proffered as experts.

1. Jill Goyette, a site acquisition specialist, testified that she could locate no suitable properties in the vicinity that could hold a telecommunications facility as a matter of right. T. 9-12; 31-34; see ex. 20, att. 5. Goyette described her role as a consultant who was to find sites for antennae where Cingular's service was weak or nonexistent. T. 10. Goyette examined seven other possible sites, but each was unsuitable for one or more reasons: the property owner was not interested in leasing space; the property already contained rival wireless telephone company equipment and had room for no more; or the property had structural impediments. T. 10-12, 32-34. One property turned out not to fill Cingular's coverage needs. T. 12.

Goyette described Cingular's rooftop project as consisting of a rectangular area, 21 by 22 feet, within which the company will locate unmanned communications equipment cabinets. T. 19, 37. She testified about the location of Cingular's structures, the dimensions of the walls and the antennae, and the color scheme. T. 21-24, 30, 40; ex. 7A. The substance of her description appears in the discussion of Cingular's project (above Section II.C). According to Goyette, all antennae will be flush with the wall. T. 24, 29-30; ex. 7A, 7B, 24(b)(1)-(3). Although Cingular's equipment would fit into a smaller space, she said that the perimeter dimensions are necessary to provide clearance for technicians to service the equipment. T. 37. The project will require no utilities except electricity and a land telephone line. T. 25-26.

Goyette asserted that Cingular's facility will operate below Federal Communications Commission emissions standards. T. 26-27. The project should generate no noise, dust, odors, or fumes. T. 26. Goyette acknowledged, however, that her field of knowledge is real estate, not engineering. T. 39.

The lease with the Burkland requires Cingular to remove all equipment when the facility is no longer needed and to restore the building to its pre-existing condition. T. 26.

2. Brian Silvering, a registered civil and structural engineer, stated that he is the principal in charge of overseeing installation of the project. T. 45.

Silvering explained that the triangular structure at the southeastern edge of the roof will be 13 to 14 feet long at its widest dimension. T. 46-47. Three antennae will be mounted on that wall. *Id.* Having two separate roof structures was necessary because interference ("shadowing") would be generated by the roof if the eastern antennae were mounted on the western side of the roof. T. 46-47.

Silvering reaffirmed that all screening walls will be no taller than 12 feet. T. 49. Cingular's circuitry cabinets will rest on a platform 3.5 feet above the roof. The elevation of the platform is necessary to permit access to the roof surface in the event repairs to the roof are necessary. *Id.* The platform's horizontal dimensions allow the equipment load to be distributed broadly on a "fairly lightly framed roof." *Id.* The circuitry's cabinets will be about 6 feet high and will be completely hidden by the screening walls. T. 54, 55.³ Silvering acknowledged that the screening walls would hide Cingular's equipment even if reduced to a height of less than 12 feet. T. 56. Cingular chose the twelve foot height to have the antennae as high as possible. T. 48, 57-58.

³ Goyette had testified that the cabinets would only be three to four feet tall. T. 23. I credit the testimony of the project engineer, Silvering.

3. Prabu Maragathavannan, a radio frequency engineer witness, testified about gaps in Cingular's existing service coverage. He had found a coverage gap along Georgia Avenue near Dennis. T. 67-69; ex. 10B. A coverage gap means that the service in the area is either insufficient or nonexistent. T. 69.⁴

Maragathavannan explained that lack of adequate coverage results in skimpy telephone service. T. 70. Calls can be dropped as the user drives in the area. *Id.* To avoid this phenomenon, transmission facilities need to be spaced so that calls can be “handed off” from one transmission cell to another as the user drives along. T. 71.

Plugging the Georgia-Dennis Avenue hole, he said, will enhance emergency “911” service. T. 81. If a subscriber does not have sufficient signal strength, a 911 call might be delayed. T.81. Improving coverage will also improve service to in-home users and will permit enhanced data service to businesses and residents. T. 73-75.

Maragathavannan asserted that height is necessary to provide service because other buildings and trees attenuate transmission signals. T. 72. The Burkland has a “decent ground elevation.” T. 73. Although Cingular is erecting other relay facilities in the vicinity (Ex. 10A), the Burkland site is necessary to plug coverage holes along Georgia Avenue. T. 77.

Cingular's transmissions will be below Federal Communications Commission emission limits and will not interfere with appliances in homes and offices. T. 79, 91; see ex. 11 at 4 (Maragathavannan affidavit). The Burkland installation will create no noise. T. 82. Maintenance visits will be limited to about once per month. T. 82.

⁴ The gaps in coverage are shown on a colored exhibit, ex. 10B, which also shows Cingular's nearby transmission facilities. It is not reproduced here because a black-and-white rendition is not informative.

Maragathavannan stated that the Burkland installation's height would not be optimal, but "a bad minimum that we could accept." T. 83. A lower elevation would cause a loss in signal strength from interference by surrounding structures and trees. T. 83. If the Burkland facility were lowered below 42 feet, Cingular might be forced to acquire an additional site in the area. T. 83-84.

Maragathavannan acknowledged that the 54.4inch antennae on the triangular structure at the back of the roof might cause radiation exposure to anyone working near them on the roof, but that danger can be avoided by turning down transmissions whenever the roof needs to be serviced. T. 86. He said that the bottom of the two-foot long antennae, because they are to be mounted at least ten feet above the roof, produce acceptable radiation exposure to anyone on the roof, "well within the lower limits." T. 85. Cingular will place warning signs on the structures. T. 85-86.

4. Mark Petrusic, an employee of Zelco Realty, the property manager for the Burkland, testified that the Burkland's board of directors had reached a meeting of the minds with Cingular on the terms of a lease. R. 59-60. As required by the condominium documents, two-thirds of the condominium owners (eight of twelve) had given their assent. *Id.* At the time of the hearing, the mortgagees for two-thirds of the owners were in the process of giving their consent. *Id.*

Petrusic acknowledged that several owners at the Burkland had been out of compliance with the terms of the Burkland's special exception approval; he believed that the building and individual condominium owners had now brought themselves into full compliance. T. 61-62. The infractions involved landscaping, hours of operation, and sign illumination. *Id.*

Petrusic saw no reason why the Burkland would not join as a petitioner in these proceedings:

“They are certainly interested in Cingular going forward.” T. 63-64.⁵

IV. CONCLUSIONS.

A. CREDIBILITY.

I credit the testimony of Cingular’s witnesses, as summarized above, with one exception. Maragathavannan and Goyette made conclusory statements that the facility will meet FCC standards but provided no supporting data. Except for an equally conclusory sentence in a Maragathavannan affidavit, the record contains no additional support. I therefore recommend that Cingular be required to file supporting data on compliance with FCC standards before the special exception is granted.

B. APPLICATION OF FACTS TO ZONING STANDARDS.

A special exception is a zoning device that authorizes certain uses, provided that pre-set legislative standards are met. Pre-set legislative standards are both general and specific. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate.

Based on the testimony and evidence of record, applying a “preponderance of the evidence” standard (see Code §59-G-1.21(a)), I conclude that the petition should be granted. In addition to the recommendations proposed by the Planning Commission and staff report, I recommend a condition that Cingular's facility be dismantled and removed when it is no longer used for telecommunications services. Toward that end, the Burkland should be required to intervene explicitly as a petitioner and be made

⁵ Cingular’s counsel stated that having the condominium association as a “co-party * * * would seem to be no problem.” T. 65.

subject to that condition. (The Burkland's president signed Cingular's revised petition (ex. 25) but it still lists Cingular as the sole petitioner).

1. Inherent and Non-inherent Adverse Effects.

Section 59-G-1.2. Conditions for Granting a Special Exception.

A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

Seven characteristics are generally used to analyze inherent and non-inherent effects of a use of property: size, scale, scope, light, noise, traffic, and environment.

The staff report lists only height and visual impact as inherent characteristics of rooftop telecommunications facilities. (Ex. 20 at 5). That is reasonable, so far as it goes, considering that such facilities emit no light or noise, and--being unmanned--generate only a trifling amount of traffic. In addition, however, telecommunications facilities also emit radio waves that may have an impact on the environment.

It follows that non-inherent characteristics of a telecommunications facility would be exceptional height, size, and visibility, especially considering its location. It also follows that a non-inherent characteristic would be a radio emission that exceeds levels deemed safe by the FCC.

Cingular's facility will have an inherent effect common to almost all rooftop telecommunications facilities--visibility. The issue is whether the dimensions and appearance of Cingular's facilities qualify

them as non-inherent adverse effects. The screening walls' monolithic character and height--over one third the height of the building on which they will be perched--make them quite conspicuous. Nevertheless, they are not so jarring as to qualify them as having a non-inherent adverse effect. The visibility of Cingular's facility is softened by having the color of the screening walls blend in with the Burkland's brick work.

As noted, Cingular's radio frequency engineer (Maragathavannan) testified that emissions will meet FCC standards but the record contains no supporting data. I therefore recommend that Cingular be required to submit to the Board adequate written proof of compliance with FCC standards.

Once compliance with FCC standards is established, I agree with the staff report (ex. 20 at 5) that the present proposal will include no non-inherent adverse effect warranting denial.

2. Section 59-G-1.21. General conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

Telecommunications facilities are permitted on roofs of buildings in the R-60 zone by special exception if the building is less than fifty feet tall and as a matter of right if the building is fifty feet tall or taller. See § 59-C-1.3, table of uses.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

The specific applicable standards are discussed below in a section marked "Specific Standards."

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a

special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

As noted above, the 1989 Kensington-Wheaton Master Plan contains no specific recommendations concerning the site or proposed uses. I concur with the staff report's conclusion that the Plan's goals and objectives are not adversely affected by the proposed use.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.

The proposed use will be in harmony with the general character of the neighborhood, a combination of medical office buildings and single family residences. The rooftop structures will be highly visible but will not be unsightly because they will be camouflaged to match the building's exterior.

The use will generate negligible traffic: monthly inspections by one technician and, perhaps, occasional repairs. For reasons stated above, the scale and bulk of the facility are not out of harmony with the general character of the neighborhood.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Provided the facility meets FCC emissions standards, the proposed use will not be detrimental to other property, to its peaceful enjoyment, and to future development of the neighborhood.

(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The use will generate no noise, vibrations, fumes, odors, or dust, illumination, glare or physical activity (other than periodic unobjectionable routine inspections and repairs).

(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

I accept the staff report's conclusion that the proposed use will not increase the number or nature of special exception uses sufficiently to affect or alter the residential nature of the area adversely. The existing special exception for the Burkland is unrelated to the proposed use.

(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Cingular's facility should have no effect on residents or visitors so long as it complies with FCC emission standards. Caution signs will be displayed to caution roof-top workers and (as a condition of approval) emissions will be reduced when roof work near the larger antennae is necessary.

(9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

(i) If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

(ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.

The proposed use will need no public services not already provided at the Burkland. No utilities are necessary except for electric power and a land telephone line.

The proposed use will have no discernible effect on traffic or traffic safety. It is not subject to local area review requirements because it will generate only once-a-month inspections by a single employee.

Policy area transportation review is not necessary under the County's current Growth Policy.

(b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Cingular must comply with all applicable permitting standards and procedures.

(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. The burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Cingular has met its burdens except for establishing compliance with FCC emission standards. A precondition of final approval will require Cingular to submit to the Board satisfactory written support of its testimony that its project satisfies FCC standards.

3. Section 59-G-1.22. Additional requirements.

(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.

Recommendations are listed at the end of this report.

(b) Using guidance by the Planning Board, the Board, the Hearing Examiner, or the District Council, as the case may be, may require a special exception to comply with Division 59-D-3 if:

(1) The property is in a zone requiring site plan approval, or

(2) The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.

Neither (1) nor (2) applies.

4. Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in ' G-1.23 or in ' G-2.

The Burkland already meets the development standards for the R-60 zone. As noted in section II.E. of this report, Cingular's facility will have no effect on any development standards element--setbacks, lot area, building coverage, building height, or parking.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

The Burkland satisfies parking requirements existing when special exception S-684 was issued.

There are no additional requirements for telecommunications facilities. See § 59-E-3.7.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities

* * * .

No waiver is necessary. The Burkland satisfies the setback requirements of the R-60 zone.

Addition of the Cingular facility necessitates no change in the setback requirements. See below, discussing § 59-G-2.58.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

The special exception is not subject to Chapter 22A.

(f) Signs. The display of a sign must comply with Article 59-F.

No signs will be displayed except for small, unilluminated warning signs for roof-top workers.

The signs will be placed so as not to be visible at street elevations.

5. Specific Standards.

a. Definition. Cingular's project meets the definition for a telecommunications facility, § 59-A-2.1, reproduced above, n. 1. It is to be used to provide wireless voice, data, and image transmission. It is unmanned. The panel antennae are well below the maximum allowed, six feet in height and two feet in width. They are to be mounted to a "structure," the screening walls.

At first glance, the definition appears to require related equipment to be located only within a building: "Equipment may be located within a building, an equipment cabinet, or an equipment room within an existing building." However, the definition does not foreclose mounting the related equipment on a rooftop. The definition uses "may", not must. It permits location "*within a building*," but does not preclude placing an "equipment cabinet" on a roof. A rooftop location is therefore compatible with the zoning ordinance definition.

b. Section 59-G-2.58.⁶

(a) Any telecommunication facility must satisfy the following standards:

- (1) A support structure must be set back from the property line as follows:*
 - a. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.*
 - b. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*

⁶ As noted above, ' 59-G-2.58, was enacted by Ordinance 15-54 and became effective December 26, 2005. That ordinance transferred all of ' 59-G-2.43(j)-(l) to ' 59-G-2.58 without change except for renumbering and for the substitution of some language at the end of 59-G-2.58(a)(3) after the reference to the Department of Permitting Services.

c. The setback from a property line is measured from the base of the support structure to the perimeter property line.

d. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

(2) A support structure must be set back from any off-site dwelling as follows:

a. In agricultural and residential zones, a distance of 300 feet.

b. In all other zones, one foot for every foot in height.

c. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.

d. The Board of Appeals may reduce the setback requirement in the agricultural and residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

These provisions, mandating setbacks for “support structures,” do not apply to telecommunications facilities mounted on the roofs of existing buildings used and sanctioned for uses other than telecommunications. Rooftop antennae and related equipment are plainly subordinate uses on such buildings. Section 59-G-2.58's setback provisions appear, rather, intended to regulate the location of towers or other free-standing structures used primarily or exclusively for radio, television, or wireless transmission, not existing buildings that predominantly serve other uses.

I come to this conclusion despite language in the Ordinance's definitions article (§ 59-A-2.1) that implies a different conclusion. In that article, a “building” is plainly a “structure.” And a “telecommunications facility” is defined as “consist[ing] of one or more antennas attached to a *support structure*.” § 59-A-2.1; italics added.

Nevertheless, it is improbable that the Council intended existing buildings that have already satisfied setback requirements to be subject to more stringent setback requirements if they have small

rooftop antennae--less than fifteen feet for whip antennae and six feet for panel antennae--mounted on them. Any other reading is implausible. Section 59-G-2.58 increases setback requirements for each foot of height. Yet, the Ordinance contains no setback requirement for the tallest buildings. Buildings over fifty feet tall in one-family residential zones may hold telecommunications facilities as a matter of right, irrespective of their setbacks. See § 59-A-6.14. It is highly improbable that the Council intended to prohibit telecommunications facilities on buildings *shorter* than fifty feet when they do not meet § 59-G-2.58's setback standards. It certainly did not say so explicitly, as would be likely if that had been its intent.

In addition, as Cingular's counsel argued in a post-hearing memorandum (ex. 24(d)), § 59-G-2.58 measures setbacks from the "base of the support structure." Sec. 59-G-2.58(a)(1)c, (2)c. Baseline measurements are not used elsewhere in the ordinance for buildings. Instead, buildings are governed by development standards under "yard requirements."

For these reasons, I concur with the staff report that § 59-G-2.58's setback requirements do not apply to telecommunications facilities located on the rooftops of existing buildings. See ex. 20 at 10 (discussing identical language in § 59-G-2.43 (transferred in relevant part to § 59-G-2.58)).

(3) The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction and before the final inspection of the building permit, the applicant must submit documentation to the Department of Permitting Services that the height and location of the support structure as authorized by the building permit.

The support structure reference does not apply to an existing building such as the Burkland. The antennae, the tops of which will be flush with the twelve-foot screening walls on top of a 31-foot high roof, will not exceed 155 feet in height.

(4) The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and

nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.

The support structure reference does not apply to an existing building such as the Burkland. The telecommunications equipment is effectively screened by twelve-foot tall walls. The walls and antennae will be camouflaged to reduce visual impact.

(5) The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunication facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunication carriers. The Board may approve a support structure holding less than 3 telecommunication carriers if: 1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decides that construction of a lower support structure with fewer telecommunication carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunication facility for all the carriers.

The support structure reference does not apply to an existing building such as the Burkland. I nonetheless recommend that the Burkland be required to join the case as an applicant, and share in the responsibility of dismantling the equipment when the facility is no longer needed.

(6) No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

The facility will have no lighting. It will have signs required by paragraph (8) below, but no others.

(7) Every freestanding support structure must be removed at the cost of the owner of the telecommunication facility when the telecommunication facility is no longer in use by any telecommunication carrier for more than 12 months.

No freestanding support structure is involved here. Nevertheless, because Cingular's facility is visually prominent, I recommend a condition that it and the property owner be jointly responsible for the facility's entire removal when it is no longer in active telecommunications use. Under Cingular's lease, it is obligated to remove its equipment when no longer needed. The proposed condition will ensure removal if Cingular or its successors do not meet that obligation.

(8) All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

The support structure reference does not apply to an existing building such as the Burkland. However, the purpose of the provision should apply to Cingular's facility and Cingular has agreed to provide signs conforming to subsection (8).

(9) Outdoor storage of equipment or other items is prohibited.

The equipment will be outdoors but on the roof. Since the definition of "telecommunications facility" anticipates rooftop locations, Cingular's proposal does not violate subsection (9).

(10) Each owner of the telecommunication facility is responsible for maintaining the telecommunication facility[] in a safe condition.

Cingular will be responsible for safety and will inspect the site monthly. Access to the roof is limited to Burkland and Cingular employees or contractors engaged in repair or service. As a condition of approval, Cingular will be required to reduce its transmissions when roof-work is being done near the larger antennae on the triangular structure.

(11) The applicants for the special exception must file with the Board of Appeals a recommendation from the Telecommunications Transmission Facility Coordinating Group regarding the telecommunication facility. The recommendation must be no more than one year old.

The record contains a letter dated June 9, 2005, from the telecommunications transmission facility coordinating group recommending approval of Cingular's facility (at 2). Ex. 20, att. 7. The recommendation is less than one year old.

(12) Prior to the Board granting any special exception for a telecommunication facility, the proposed facility must be reviewed by the County Telecommunication Transmission Facility Coordinating Group. The Board and Planning Board must make a separate, independent finding as to need and location of the facility.

Both the Group and the Planning Board recommended approval. The undisputed testimony of the radio frequency engineer witness (Maragathavannan) and the coverage maps on which he relied (ex. 10A, 10B) are substantial evidence that improved coverage of wireless service by Cingular is necessary and desirable in the vicinity of Georgia and Dennis Avenues. The Burkland site will provide that improved coverage and will ensure more reliable "911" service. Testimony by the site acquisition specialist witness (Goyette) establishes that there are no available of-right sites and no special-exception sites equal or superior to the Burkland available in the vicinity.

(b) Any telecommunication facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Not applicable. The application was filed after 2002.

(c) Any telecommunication facility constructed as of November 18, 2002 may continue as a conforming use.

Not applicable. This is a new project.

V. RECOMMENDATIONS AND CONDITIONS.

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that the petition in no. S-2662 requesting a special exception in an R-60 zone for a telecommunication facility to be installed on the roof of an existing medical office building at 10313 Georgia Avenue known as the Burkland Condominium, Inc., Lot P-718, tax map JP 123, be *granted* with the following *conditions*:

1. Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.

2. The maximum number of nine panel antennae shall be permitted, six of which will be no longer than two feet and three no longer than 54.4 inches. The tops of the antennae will be flush with

the tops of the screening walls to which they are attached. The screening walls shall not exceed a height of twelve feet. Screening walls and antennae will be colored to match the exterior of the Burkland condominium building.

3. All equipment associated with the telecommunication facility must be removed at the cost of petitioner New Cingular Wireless PCS (or its successors) or, failing that, by petitioner Burkland Condominium, Inc. (or its successors) when the facility is no longer in active use by any telecommunication carrier for more than six months.

4. This special exception shall not take effect until the submission of an amended petition clearly designating Burkland Condominium, Inc., as a petitioner, signed by an authorized representative of the Condominium.

5. This special exception shall not take effect until submission to, and acceptance by the Board, of documentary evidence verifying that the proposed facility will comply with applicable emissions standards promulgated by the Federal Communications Commission.

6. The telecommunication facility must display (1) a contact and warning information sign, no larger than two square feet, affixed to the screening wall outside the equipment platform on the side that provides access into the enclosure and (2) a similar sign on the triangular structure so that it easily visible to anyone working near the structure. The signs will be positioned not to be visible from street level. They must identify the owner and the maintenance service provider for the facility and provide the telephone number(s) of one or more persons to contact regarding the facility. A dated photograph of the signs must be provided to the Board of Appeals upon installation. The sign must be updated and the Board of Appeals notified within ten days of any change in ownership.

7. Petitioners (and their successors) are jointly responsible for maintaining the facility in a safe condition. In that connection, New Cingular Wireless PCS and its successors are required to reduce the intensity of telecommunications emissions whenever notified that repair or other work is to be conducted on the roof on the side of the triangular structure to which antennae are mounted.

8. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to implement the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and facility comply with all applicable codes, regulations, directives, and other governmental requirements.

Respectfully submitted.

LUTZ ALEXANDER PRAGER
Hearing Examiner

Dated: May 22, 2006